



United States Department of Agriculture  
Office of the General Counsel

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DEPARTMENT OF  
WATER RESOURCES

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**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

July 13, 2022

Gary Spackman  
Director  
Idaho Department of Water Resources  
Idaho Water Center  
322 E Front Street, Suite 648  
Boise, ID 83702-7371

Director Spackman:

On June 27, 2022, the United States Forest Service (Forest Service) received a document issued and signed by you as Director of the Idaho Department of Water Resources (IDWR). The document is dated June 22, 2022, and is styled as an “ORDER PARTIALLY GRANTING PETITION; ORDER TO SHOW CAUSE.” This order is relevant to 11 water rights held by the United States of America acting through the Department of Agriculture, Forest Service, associated with the Fourth of July Creek grazing allotment (IDWR Docket No. P-OSC-2022-001). This letter is a special appearance offered in the interest of comity.

As a sovereign, the United States—and its agencies—cannot be sued in any court or brought before state agencies without its express consent. The United States submits this letter as a matter of comity (1) to make a special appearance to advise the Director and petitioners that there has been no waiver of federal sovereign immunity here, and the Director therefore lacks jurisdiction over the United States; (2) to request a hearing at which the Forest Service would make a special appearance to make its jurisdictional arguments without waiving jurisdiction or any other defense; and (3) to request that the hearing before the IDWR Director be stayed until the conclusion of a lawsuit that the United States filed on June 2, 2022, in the U.S. District Court for the District of Idaho, Civil No. 1:22-cv-00236-DKG, to challenge the lawfulness of the orders.

*Background on Order*

Your order states, in part, as follows:

3. In accordance with Idaho Code§ 42-224(2), the United States of America acting through the Department of Agriculture, Forest Service must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code§ 42-222(2): [listing various water rights relevant to the allotment].

4. In accordance with Idaho Code§ 42-224(6), the United States of America acting through the Department of Agriculture, Forest Service has 21 days from completion of service of this order to request in writing a hearing pursuant to Idaho Code§ 42-1701A(1)-(2). If the United States requests such a hearing, it must also serve a copy of the request upon the petitioner and all current Fourth of July Allotment livestock grazing permit or lease holders known to the United States.

5. In accordance with Idaho Code§ 42-224(7), if the United States fails to respond to the above order to show cause within 21 days, the stockwater rights for which the *Verified Petition for Order to Show Cause* has been partially granted shall be considered forfeited, and the Director shall issue an order within 14 days stating the stockwater rights have been forfeited pursuant to Idaho Code§ 42-222(2).

### *Legal Background on Sovereign Immunity*

The United States may only be sued when it has consented to suit. *United States v. Bormes*, 568 U.S. 6, 9 (2012); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”). The terms of any waiver of federal sovereign immunity are for Congress to determine. *United States v. Shaw*, 309 U.S. 495, 503 (1940).

The United States Supreme Court has frequently held that waivers of sovereign immunity must be strictly construed in the government's favor and must be unequivocally expressed in statutory text. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 290 (2012); *Orff v. United States*, 545 U.S. 596, 601-02 (2005). A waiver of sovereign immunity cannot be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015). Thus, “[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity together with a claim falling within the terms of the waiver.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted); *see also United States v. Lewis County*, 175 F.3d 671, 677 (9th Cir. 1999), *cert. denied* 528 U.S. 1018 (Waiver of sovereign immunity for “‘taxation’ does not *unequivocally* include the assessment of interest and penalties.”). Furthermore, “[i]t is unquestioned that the Federal Government retains its . . . immunity from suit . . . in state tribunals.” *Alden v. Maine*, 527 U.S. 706, 749 (1999).

The McCarran Amendment is a limited waiver of federal sovereign immunity that provides in relevant part:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are

inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction ....

43 U.S.C. § 666(a). Nevertheless, the McCarran Amendment is not a waiver that extends to every matter involving water rights. In a case from the Snake River Basin Adjudication, the United States Supreme Court reaffirmed that “waivers of federal sovereign immunity must be unequivocally expressed in the statutory text.” *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993) (quotation omitted). The Court there also rejected the notion that the McCarran Amendment subjected the United States to “all state laws applicable to general water right adjudications,” *Id.* at 6 (emphasis in the original); *see also San Luis Obispo Coastkeeper v. US. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd*, 827 F. App'x 744 (9th Cir. 2020) (“[T]he purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States.”). No waiver of sovereign immunity authorizes this action by the IDWR impacting the water rights of the Forest Service.

#### *Request for Hearing and Request for Stay*

Without agreeing that IDWR has jurisdiction in this instance, the Forest Service requests that a hearing be held at which the Forest Service will make a special appearance for the sole purpose of presenting its jurisdictional arguments. Due to the recent litigation filed by the United States in federal district court, however, the Forest Service also requests that the hearing be stayed pending the completion of that litigation.

While recently enacted legislation, House Bill 608 (HB 608), contains a number of timeframes for action by IDWR, nothing in the legislation prevents you as Director from agreeing to the Forest Service's requests. The new statute only requires that “the director must issue the order regarding forfeiture no later than forty-five (45) days after completion of the administrative proceeding.” HB 608, § 1 (amending Idaho Code § 42-224 by creating new subsection (8)). HB 608 provides no timing limitation regarding the scheduling or completion of the hearing. Staying any hearing would serve the interests of administrative and judicial efficiency because the result of the litigation may obviate the need for a hearing.

The Forest Service is not waiving any defense by way of this limited special appearance and specifically reserves all rights and defenses available to it with respect to the IDWR orders and any future actions taken by the State of Idaho with respect to this matter or future actions taken in association with state legislation purporting to affect the Forest Service's stockwater rights. I, Nicholas Pino, will be serving as the Forest Service's counsel in association with this special appearance and my contact information follows below. As a matter of comity and courtesy, the Forest Service will serve this letter on the petitioners and livestock grazing permit holders listed in the relevant certificate of service.

Thank you for your attention to this matter.

Sincerely,



Nicholas Pino  
Associate Regional Attorney

U.S. Department of Agriculture  
Office of the General Counsel  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of July 2022, I caused to be served a true and correct copy of the foregoing Letter, by the method indicated below, upon the following:

Gary Spackman, Director  
IDAHO DEPT. OF WATER RESOURCES  
Idaho Water Center  
322 E. Front Street, Suite 648  
Boise, ID 83702-7371

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*Attorneys for Petitioners and Grazing Permit Holders  
Jaycob J. and Sheyenne A. Smith*

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Idaho State Office  
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Certified U.S. Mail with return receipt

*Stockwater Right Owner*

### ***COURTESY COPIES TO:***

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A handwritten signature in blue ink, reading "Stacy Braach", written over a horizontal line.

Stacy Braach  
OGC Admin/Legal Assistant